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Kentucky Law Survey: Evidence

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EVIDENCE

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I. HEARSAY

A. *Statements of Co-Conspirators*

Rule 801(d)(2)(E) of the Federal Rules of Evidence (FRE) provides that an out-of-court statement is not hearsay if "offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."[1] While this rule is clearly stated, the federal courts of appeals have grappled in recent years with practical problems associated with its implementation. These problems have developed because of the unexpressed but obvious requirement within the rule that before a co-conspirator's statement may be introduced into evidence, it must be determined that a conspiracy actually existed. This requirement raises three concerns: 1) the method to be used by the court in making this determination; 2) the quantum of proof required; and 3) when the determination is to be made. The Sixth Circuit recently dealt with these questions in two important cases: *United States v. Enright*[2] and *United States v. Vinson.*[3]

Enright involved the introduction into evidence of recorded conversations between an alleged co-conspirator of defendant Chief of Police Enright and an undercover policeman. Recorded during the course of the alleged conspiracy, these

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[1] In most jurisdictions, statements by co-conspirators are admitted into evidence as exceptions to the hearsay rule. R. LAWSON, KENTUCKY EVIDENCE LAW HANDBOOK 139 (1976) [hereinafter cited as LAWSON]. The federal rule differs from the common law rule in that under the federal rule, statements by co-conspirators are not considered to be hearsay at all.

[2] 579 F.2d 980 (6th Cir. 1978).

[3] 606 F.2d 149 (6th Cir. 1979), *cert. denied*, 444 U.S. 1074, *reh. denied*, 100 S. Ct. 1668 (1980). The day following its decision in *Vinson*, the Sixth Circuit decided yet another case concerning the admissibility of co-conspirator testimony, United States v. Nickerson, 606 F.2d 156 (6th Cir.), *cert. denied*, 444 U.S. 994 (1979). Since *Nickerson* is little more than a reiteration of those principles established in *Enright* and *Vinson*, it will not be discussed in this survey.

conversations clearly set forth Enright's involvement in illegal gambling operations. The trial court admitted the recordings into evidence upon the establishment by the government of a prima facie case of the existence of, and Enright's participation in, the conspiracy. This procedure was consistent with the Sixth Circuit's 1975 decision in *United States v. Mayes*,[4] which had adopted the existing majority rule among circuits as to the preliminary admissibility of a co-conspirator's testimony. *Mayes* held that before a statement may be admitted under the co-conspirator exception to the hearsay rule, the government must first establish a prima facie case of the conspiracy and of the defendant's connection with it.[5]

Enright was convicted. On appeal, he contended that *Mayes* should be re-examined in light of the First Circuit's 1977 decision of *United States v. Petrozziello*,[6] which held that the adoption of the Federal Rules of Evidence in 1975 dictated a more stringent standard of proof than that of the prima facie case.[7] *Petrozziello* specifically rejected the prima facie test in light of FRE 104(a),[8] which it found to be controlling. Since Rule 104(a) requires that "[p]reliminary questions concerning . . . the admissibility of evidence *shall be determined by the court*,"[9] the *Petrozziello* court reasoned that the trial judge had a greater duty than that of merely satisfying himself of the existence of a prima facie case. Instead, the trial judge should resolve by a *preponderance* of the evi-

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[4] 512 F.2d 637 (6th Cir.), *cert. denied*, 422 U.S. 1008 (1975). *Mayes* was decided before the Federal Rules of Evidence became effective on July 1, 1975.

[5] *Id.* at 651. The court explained what is meant by a "prima facie case" in the following manner: "[A] prima facie case is less than proof beyond a reasonable doubt; indeed, it is less than a preponderance . . . . Moreover, the prima facie case need not be established before the proffered hearsay may be admitted; the judge may admit it conditionally." *Id.*

[6] 548 F.2d 20 (1st Cir. 1977).

[7] *Id.* at 23.

[8] FED. R. EVID. 104(a) states:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

[9] *Id.* (emphasis added).

dence[10] that a conspiracy involving the defendant existed before allowing a statement to be admitted under the co-conspirator rule.[11]

The *Enright* court noted, however, that the Fifth Circuit Court of Appeals, in *United States v. Ochoa,*[12] had reached a different decision by employing FRE 104(b).[13] Since Rule 104(b) provides that evidence may be admitted conditionally when its relevance "depends upon the *fulfillment of a condition of fact,*"[14] the Fifth Circuit reasoned that the determination of the existence of a conspiracy and the defendant's connection with it would be a "fulfillment of a condition of fact" and thus Rule 104(b) applied. Having thus rejected the First Circuit's position that Rule 104(a) and the "preponderance of the evidence" test should be used, *Ochoa* reaffirmed the Fifth Circuit's practice of admitting the evidence merely upon proof of a prima facie case.[15]

Unpersuaded by *Ochoa's* reasoning, the Sixth Circuit in *Enright* adopted *Petrozziello's* view that Rule 104(a) should control, stating: "The question seems to be more one of basic reliability and fairness of admitting the evidence rather than a relevancy question of whether the evidence has any tendency to make a fact in issue more or less probable than it would be

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[10] Proof by a preponderance is proof that leads a jury to believe that the existence of a contested fact is more probable than its nonexistence. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 339 (2d ed. 1972) [hereinafter cited as MCCORMICK].

[11] 548 F.2d at 23.

[12] 564 F.2d 1155, *cert. denied,* 436 U.S. 947 (1978).

[13] FED. R. EVID. 104(b) states: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

[14] *Id.* (emphasis added).

[15] 564 F.2d at 1157 n.2. The Advisory Committee note to Rule 104(b) establishes the procedure a trial judge is to use in implementing this rule:

> The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issues is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the issue is not such as to allow a finding, the judge withdraws the matter from their consideration.

FED. R. EVID. 104(b), Advisory Committee note (1975). It is this feature of jury participation that distinguishes Rule 104(b) from Rule 104(a).

without that evidence."[16] The Sixth Circuit thus determined that the initial questions of the existence of a conspiracy and the involvement of the defendant in that conspiracy are to be decided solely by the trial judge under FRE 104(a). Furthermore, the court held that the trial judge should apply the preponderance of the evidence standard in deciding these preliminary questions:[17] "[I]f it is more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy, the hearsay is admissible."[18]

The Sixth Circuit thus joined the majority of those circuits that have re-examined the standard of proof necessary for admission of co-conspirator testimony. Since the federal rules became effective in 1975, the Courts of Appeals for the First,[19] Fifth,[20] Seventh,[21] and Eighth[22] Circuits have abandoned the prima facie standard in favor of the more exacting preponderance standard. While there is some skepticism as to whether the actual test employed has any impact on the judge's determination,[23] the preponderance test, unlike the

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[16] United States v. Enright, 579 F.2d at 984, citing FED. R. EVID. 401. Rule 401 states: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence."

[17] *Id.* at 986.

[18] *Id.* (quoting *Petrozziello,* 548 F.2d at 23). The court based its rejection of the prima facie test on its reading of Rule 104(b) (see note 13 *supra* for the text of this rule). Rule 104(b), in the court's opinion, is a classic restatement of the prima facie test. Since this language was not made part of Rule 104(a), then the prima facie test was certainly not that contemplated by the framers of the rule. The court also rejected the "reasonable doubt" standard, relying on the fact that the U.S. Supreme Court has never required this high standard of proof for the determination of the preliminary question of admissibility of statements of co-conspirators. *See* United States v. Nixon, 418 U.S. 683, 701 n.14 (1974).

[19] United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977).

[20] United States v. James, 576 F.2d 1121 (5th Cir. 1978), *reh. en banc,* 590 F.2d 575 (5th Cir.), *cert. denied,* 442 U.S. 917 (1979).

[21] United States v. Santiago, 582 F.2d 1128 (7th Cir. 1978).

[22] United States v. Bell, 573 F.2d 1040 (8th Cir. 1978).

[23] The Second Circuit, in United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied,* 397 U.S. 1028 (1970), stated: "When the matter is viewed from the standpoint of the trial judge, it may be hard to say more than that he must satisfy himself of the defendant's participation in a conspiracy on the basis of the

prima facie test, requires that the judge base his decision not only on the government's evidence but on the defendant's proof as well. This procedure is fairer to the defendant, who may have proof of his non-participation in the conspiracy. Moreover, the preponderance test appears to be that contemplated by the framers of the federal rules. FRE 104(a) specifically states that the trial judge shall "determine" preliminary questions concerning the admissibility of evidence. Arguably, a "determination" requires the weighing of both sides of an issue.[24] The prima facie test, which requires only a consideration of the prosecution's evidence, is not consistent with the concept of "determination." By thus conforming to the language of Rule 104(a), *Enright* has provided an additional measure of protection to defendants subject to potentially unreliable statements of co-conspirators.

One year after its decision in *Enright,* the Sixth Circuit again addressed the co-conspirator issue in *United States v. Vinson.*[25] In *Vinson,* Magistrate Thompson and Sheriff Vinson had been indicted for conspiracy to extort money and for extortion of money from a coal company. The district court admitted testimony of out-of-court statements by Sheriff Vinson that tended to incriminate Magistrate Thompson, and instructed the jury that the hearsay was not to be considered as evidence against the magistrate until "you are satisfied or the Court makes a ruling of a prima facie case of conspiracy".[26] The district judge later made the necessary *Enright* finding; *i.e.,* that the government had proved by a preponderance of the evidence that the sheriff and the magistrate were involved in a conspiracy. He then instructed the jury that his earlier admonition concerning the evidence was now withdrawn. Since the defendants had been charged with the offense of

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non-hearsay evidence." This view was expressed in Note, *Co-Conspirator Declarations: Procedure and Standard of Proof for Admission Under the Federal Rules of Evidence,* 55 CHI.-KENT L. REV. 577, 600-01 (1978-79) (citing *Geaney).*

[24] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966) provides the following definition of "determine": "to settle or decide by choice of alternatives or possibilities."

[25] 606 F.2d 149 (6th Cir. 1979), *cert. denied,* 444 U.S. 1074, *reh. denied,* 100 S. Ct. 1668 (1980).

[26] *Id.* at 151.

conspiracy, they objected to the judge's statement on the grounds that it was the equivalent of advising the jury that a conspiracy actually existed.

Recognizing that *Enright* had not provided trial judges with guidance for structuring the order of proof at trial,[27] the Sixth Circuit in *Vinson* proposed three methods by which trial judges can allow the government to present its proof, while protecting defendants from inadmissible hearsay: 1) the judge may conduct a "mini-hearing" in which the government and the defendant present their proof outside the presence of the jury; 2) the judge may require that the government meet its burden by producing *non-hearsay* evidence of conspiracy before seeking to admit co-conspirators' statements; and 3) the judge may admit the hearsay conditionally, as was done in *Vinson*. Because of the potential prejudice to the defendant inherent in this last method, however, the court outlined several safeguards that a trial judge must observe if he chooses this alternative. The court must inform the jury that the statements are subject to the defendant's objection and that the prosecution must prove the conspiracy by a preponderance of the evidence. Should the court find that the *Enright* test is satisfied, then the jury can consider the conditionally admitted hearsay. If the government fails to meet its burden, however, the court must, on defendant's motion, declare a mistrial, unless it is convinced that the defendant's case has not been prejudiced by the hearsay.[28]

Vinson's purpose in suggesting the three above alternatives was to provide trial courts with a choice, so as not to unduly restrict the judge in his control of the order of proof at trial.[29] The first two alternatives — the "mini-hearing" and the procedure by which the government first introduces its non-hearsay evidence in order to meet its initial burden — may be seen as more time-consuming than the third alternative of admitting the hearsay evidence conditionally, subject to later demonstration of its admissibility.[30] While the third

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[27] *Id.* at 152.

[28] *Id.* at 152-53.

[29] *Id.* at 152.

[30] The court cited United States v. James, 590 F.2d 575 (5th Cir. 1979), for its

alternative thus may *seem* more appealing from the standpoint of efficiency, its potential prejudice to the defendant should be sufficient to persuade judges to use it sparingly. Additionally, this third alternative may not *really* be more efficient than the other approaches. If the government fails to carry its burden, only two remedies are available: the judge may give a cautionary instruction if he is convinced that this would shield the defendant from prejudice; otherwise, he must declare a mistrial.[31] The potential waste of time and expense of a mistrial is obvious. In order to avoid declaring a mistrial, a judge might give a cautionary instruction without adequately determining the risk of prejudice to the defendant. A court would be well-advised to avoid a procedure with the potential for either a mistrial or a cautionary instruction of questionable value.[32]

If a court is concerned that a "mini-hearing" would be "burdensome, time-consuming and uneconomic," as suggested by *Vinson*,[33] then the clearly preferable approach is to require the government to first submit its non-hearsay proof of the conspiracy in order for the judge to make the required *Enright* finding. This approach has been recommended by the First,[34] Fifth,[35] and Eighth[36] Circuits, each of which has recognized that although the trial judge should retain discretion to

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criticism of the "mini-hearing" as "burdensome, time-consuming and uneconomic." 606 F.2d at 152.

[31] Of course, if the government has failed to prove the defendant's participation in the conspiracy, a judgment of acquittal may be in order; the question is whether the trial judge feels a reasonable jury could, on the basis of non-hearsay evidence, find the defendant guilty beyond a reasonable doubt. *See* FED. R. EVID. 29(a); United States v. Taylor, 464 F.2d 240 (2d Cir. 1972). It is possible for a court to find that the government has failed to prove by a preponderance of the evidence the defendant's participation in the conspiracy and thus exclude the co-conspirator's statements, while at the same time denying a motion for judgment of acquittal on the remaining counts and holding that the case is one for the jury.

[32] "In some situations . . . the influence of improper testimony upon the minds of the jury cannot . . . be removed by the instruction of the court." 4 GARD, JONES ON EVIDENCE § 24.5 (6th ed. 1972).

[33] 606 F.2d at 152.

[34] United States v. Petrozziello, 548 F.2d 20, 23 n.3 (1st Cir. 1977).

[35] United States v. James, 590 F.2d 575, 582 (5th Cir. 1979).

[36] United States v. Macklin, 573 F.2d 1046, 1049 n.3 (8th Cir.), *cert. denied*, 439 U.S. 852 (1978).

admit hearsay subject to later demonstration of admissibility at trial, it would be better to avoid the danger of exposing the jury to evidence that is later declared inadmissible.

Having disposed of the question of the order of proof at trial, the *Vinson* court turned to the equally important issue of whether the judge may consider the hearsay evidence itself in making the *Enright* determination of the existence of a conspiracy. The court relied on the language of FRE 104(a),[37] which states that the judge "is not bound by the rules of evidence" and held that the trial judge may consider the statements themselves in deciding the preliminary question of admissibility. This proposition has been the subject of considerable controversy among circuits.[38] The obvious objection to the judge's consideration of the hearsay statement in determining whether a conspiracy existed is that the statement has a tendency to "lift itself by its own bootstraps to the level of competent evidence."[39] It is unfortunate that the Sixth Circuit, while carefully setting forth procedures that would guard the defendant against possible prejudice at trial, refused to require that the judge base his decision solely on non-hearsay.

B. *Admissions by Agents*

A well-recognized exception to the hearsay rule permits the introduction into evidence of extra-judicial admissions made by a party-opponent.[40] An extension of this doctrine provides that under certain circumstances, statements made by an agent or employee of that party may likewise be intro-

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[37] See note 8 *supra* for the text of this rule.

[38] In support of the proposition that the judge may consider the hearsay statement in making his determination, see United States v. James, 590 F.2d 575, 592 (5th Cir. 1979) (Tjoflat, J., concurring); United States v. Martorano, 557 F.2d 1, 12, *reh. denied*, 561 F.2d 406 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978); United States v. Petrozziello, 548 F.2d 20, 23 n.2 (1st Cir. 1977). *Contra*, United States v. James, 590 F.2d at 581; United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978).

[39] Glasser v. United States, 315 U.S. 60, 75 (1942).

[40] "Admissions" have been defined as "the words or acts of a party-opponent, or of his predecessor or representative, offered as evidence against him." MCCORMICK, *supra* note 10, at 628. Admissions are sometimes regarded as exceptions to the hearsay rule and sometimes as not constituting hearsay at all. *Id.* at 628-29.

duced into evidence against the party. An agent's admission against his principal is clearly admissible where the agent is expressly authorized to *speak* on the principal's behalf.[41] A troublesome question arises, however, where the statement sought to be introduced was made by an agent having only the authority to *act* for his principal.[42] In this latter situation, the Kentucky courts have consistently held that an "acting" agent's extra-judicial admission is admissible only if it is part of the "res gestae," *i.e.*, if it was made substantially contemporaneously with the transaction it describes and within the performance of the agent's duties.[43] This res gestae test has been criticized as "inadequate"[44] and as "a useless and misleading shibboleth."[45]

In attempting to apply the test, courts have been forced to decide whether the time period contemplated by the expression "contemporaneous with" involves a few minutes, hours, or days, and whether statements made by an employee hired to perform a particular job are admissible where those statements concern a matter not falling within the confines of that job.[46] Recognizing the difficulty of application of the traditional res gestae test, the Federal Rules of Evidence adopted a much simpler rule: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a

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[41] *Id.* at 639. A corporate officer is a typical example of a "speaking" agent.

[42] An "acting" agent is one who is hired to perform specific duties for his principal, but who has no authority to act as a spokesman for the principal. *See* MCCORMICK, *supra* note 10, at 640-41.

[43] LAWSON, *supra* note 1, at 133.

[44] MCCORMICK, *supra* note 10, at 640.

[45] Preston v. Commonwealth, 406 S.W.2d 398, 400 (Ky. 1966), *cert. denied*, 386 U.S. 920 (1967).

[46] In Consolidated Coach Corp. v. Earl's Adm'r, 94 S.W.2d 6, 9 (Ky. 1936), the Kentucky Court of Appeals held that statements made within five to ten minutes following an accident to the first person or persons to whom the driver talked were admissible. Statements made 30 minutes after the accident, however, were disqualified under the res gestae rule, as were statements made two or three days later. In Niles v. Steiden Stores, 190 S.W.2d 876, 878 (Ky. 1945), plaintiff brought a negligence action against a storekeeper when plaintiff slipped and fell on the floor of his shop. A statement made to the plaintiff by the shop's butcher concerning the condition of the floor was held inadmissible since the butcher's duties had nothing to do with the floors. For a discussion of other cases dealing with the res gestae rule in Kentucky, *see* LAWSON, *supra* note 1, at 136-38.

statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship."[47] Two years after the effective date of the federal rules, the Kentucky Court of Appeals applied this approach in *Jones v. Heady*.[48]

The plaintiff, Jones, was injured in a fall on defendant Heady's cattle guard. After the accident, Heady's employee told Jones that the cattle guard had been broken the day before and that he had told Heady that it should be fixed. At trial, Jones tried to introduce the statement of the employee as an admission against Heady. The statement was excluded by the trial court as inadmissible hearsay. The court of appeals reversed:

> The statement, if the jury accepts the fact that it was made, is an admission against the interest of the employer and as such constitutes an exception to the rule against hearsay. A statement made by an employee *concerning a matter within the scope of his employment* soon after an accident which is against the interest of his employer is inherently trustworthy for the reason that the *interest of the employee in continued employment* would ordinarily prevent him from making a false statement against the interest of the employer.[49]

The court pointed out that the Advisory Committee Note to Rule 801(d)(2)(D) of the Federal Rules of Evidence[50] recognizes a substantial trend toward the admission of employees' statements that relate to matters within the scope of their employment. Interestingly, the court did not expressly adopt Rule 801(d)(2)(D), nor did it reject the traditional res gestae rule.[51] The court's approval of the federal approach is unmis-

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[47] FED. R. EVID. 801(d)(2)(D).

[48] 553 S.W.2d 288 (Ky. Ct. App. 1977).

[49] *Id.* at 290 (emphasis added).

[50] Through an oversight, the court actually cited the "Rules of Federal Procedure." *Id.*

[51] The court did not even mention the res gestae requirement. It is difficult to determine whether the case would have been decided differently under the res gestae rule. The time requirement is probably met since the court indicated that the employee's statement was made at the "time and place" of the accident. Since the court did not detail the employee's duties, however, whether the employee was speaking

takable, however. Only one phrase in *Heady* is inconsistent with FRE 801(d)(2)(D): that an employee's statement "concerning a matter within the scope of his employment [made] *soon after an accident* . . . is inherently trustworthy."[52] The phrase "soon after an accident" evokes the "contemporaneous in time" concept that is characteristic of the res gestae approach. The rationale of *Heady,* however, is that of the federal rule, and it can be predicted with reasonable certainty that the appellate court would, in an appropriate case, hold admissible a non-contemporaneous statement made within the course of employment. *Heady,* of course, is a court of appeals case; it is possible that the Kentucky Supreme Court may view the matter differently.

C. *Declarations Against Penal Interest*

In 1893, the Kentucky Court of Appeals held that the defendant in a homicide case could not introduce evidence that another man, on his deathbed, had confessed to committing the crime.[53] This case established the rule that would exist in Kentucky for the next eighty-five years, *i.e.,* that extra-judicial declarations against one's penal interest, unlike declarations against one's pecuniary or proprietary interest, would not qualify as exceptions to the hearsay rule.[54] The Kentucky approach was typical of the rule as it existed under the common law of most other jurisdictions in the United States.[55] In contrast to the common law doctrine, however, the Federal Rules of Evidence provide that a declaration against one's penal interest also qualifies as an exception to the hearsay rule. Rule 804(b)(3) provides:

> The following are not excluded by the hearsay rule if the

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about a matter within the scope of his employment is not known.

[52] 553 S.W.2d at 290 (emphasis added).

[53] Davis v. Commonwealth, 23 S.W. 585 (Ky. 1893).

[54] The Kentucky rule relating to declarations against interest was best summarized in Evans v. Payne, 258 S.W.2d 919, 922 (Ky. 1953), as follows: "It is a familiar exception to the [hearsay] rule that the declarations of persons since deceased are admissible in evidence, provided the declarant had peculiar means of knowing the fact stated, had no interest to misrepresent it, and it was against his pecuniary and proprietary interest."

[55] MCCORMICK, *supra* note 10, at 673.

> declarant is unavailable as a witness: . . . A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

In 1978, the Kentucky Supreme Court again faced the issue of the admissibility of declarations against penal interest. In *Crawley v. Commonwealth,*[56] the Court overruled eighty-five years of case law and held that declarations against penal interest would henceforth be admissible under the circumstances outlined in FRE 804(b)(3).[57]

In *Crawley,* James Williams and Roger Crawley were convicted of first-degree robbery enhanced by persistent felony charges and were each sentenced to prison terms of thirty-five years. During a pre-trial conference, Williams had spontaneously stated that he and someone else had committed the robbery but that the "someone else" was not Crawley. The defendants were jointly tried; Williams was present in the courtroom, but because of his assertion of his privilege not to testify, he was unavailable for cross-examination.[58] Crawley unsuccessfully sought to introduce Williams' declaration against interest into evidence. On appeal, Crawley contended that the exclusion of the exculpatory evidence deprived him of his constitutional right to present a defense and denied him a fair trial.

The Kentucky Supreme Court noted that its practice had long been not to recognize an exception to the hearsay rule for declarations against penal interest. The United States Su-

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[56] 568 S.W.2d 927 (Ky. 1978), *cert. denied,* 439 U.S. 1119 (1979).

[57] *Id.* at 931.

[58] Prior to *Crawley,* a declaration against interest could not be introduced unless the declarant was deceased at the time of trial. The Federal Rules of Evidence, as well as most states, permit the admission of declarations against interest if the declarant is unavilable for any valid reason. LAWSON, *supra* note 1, at 153-54.

preme Court in *Chambers v. Mississippi*,[59] however, had held that strict application of such a rule could result in the deprivation of due process to a criminal defendant by denying him evidence crucial to his defense.[60] The defendant in *Chambers*, pursuant to a limited Mississippi hearsay exception similar to Kentucky's, had been refused the right to introduce a statement made by another that he, not Chambers, was responsible for the murder of a police officer. The Supreme Court assessed the testimony and, finding it reliable,[61] held that to deprive the defendant of the testimony under state evidence law would deny the defendant due process of law under the fourteenth amendment.[62] While recognizing *Chambers'* impact on Kentucky's restricted declarations against interest exception, the Kentucky Supreme Court was concerned that declarations against penal interest often lack the reliability that statements against pecuniary and proprietary interest possess.[63]

The Court noted that FRE 804(b)(3) permits the introduction of statements that could expose the declarant to criminal liability, subject, however, to the following provision: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."[64] Convinced that this requirement of

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[59] 410 U.S. 284 (1973).

[60] *Id.* at 302.

[61] The Court employed a four-part analysis to determine the reliability of the hearsay evidence in *Chambers*. First, the Court noted that the declarant's confessions were made shortly after the crime had occurred. Second, each confession was corroborated by some other evidence. Third, the confessions were undeniably self-incriminatory; and finally, the declarant was present in the courtroom and could have testified. *Id.* at 300-01. *Crawley* cited this analysis with approval. 568 S.W.2d at 931.

[62] 410 U.S. at 302. The Court did not, however, decide whether a state's exclusion of the penal interest exception might in some cases serve the valid purpose of excluding untrustworthy testimony.

[63] Exclusion, where the limitation prevails, is usually premised on the view that admissions would lead to the frequent presentation of perjured testimony to the jury. It is believed that confessions of criminal activity are often motivated by extraneous consideration and, therefore, are not as inherently reliable as statements against pecuniary or proprietary interests.

568 S.W.2d at 931 (quoting *Chambers*, 410 U.S. at 299-300).

[64] The Kentucky Supreme Court determined that this requirement of corroboration was not met in *Crawley* since there was no indication that Williams had made the statement to anyone else at any other time. 568 S.W.2d at 931.

corroboration would provide an adequate safeguard against the admission of inherently unreliable evidence, the Court adopted FRE 804(b)(3) as Kentucky's new hearsay exception for declarations against interest.

With no additional discussion, the Court also adopted the broader unavailability requirement of Rule 804(a).[65] In contrast to the former Kentucky practice of permitting declarations against interest only in those cases where the declarant is deceased at the time of trial, the new rule allows such declarations to be introduced when the declarant is unavailable for any valid reason. These two new rules will considerably broaden the circumstances under which extra-judicial statements against interest will be admitted into evidence.

II. CHARACTER EVIDENCE

In Kentucky, as elsewhere, the rule is well-established that the prosecution in a criminal case may not introduce evidence of a defendant's bad character before the defendant himself puts his character in issue.[66] Similarly, a criminal de-

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[65] FED. R. EVID. 804(a) states:

"Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of his statement; or

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrong doing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

[66] The defendant is allowed to present testimony that will prove traits of character inconsistent with the offense charged. For example, the defendant may attempt to prove a trait of honesty in a theft case or a trait for peace and quietude in a murder case. The prosecution is then allowed to rebut the defendant's testimony with proof of his trait for dishonesty or violence. In addition, testimony of a defendant's general

fendant has the right, with certain exceptions, to conceal any prior criminal activity from the jury.[67] The reason for these two firmly established legal principles is obvious: a jury, exposed to the fact that the defendant has a character trait for violence or a record of prior criminal activity, may determine the defendant's guilt on the basis of these factors rather than on the evidence produced at trial. It is generally felt that this potential for prejudice to the defendant outweighs whatever value the evidence of prior criminal activity might otherwise have. Therefore, unless the defendant puts his character in issue, or unless the evidence of prior criminal conduct fits into one of the specific exceptions to the general rule,[68] direct testimony concerning the defendant's previous criminal activity is prohibited.

This prohibition, however, provides only partial protection to defendants. Prosecutors, unable to inform the jury directly of a defendant's prior activities, have achieved the same result by introducing photographs of the defendant taken from police files. These photographs, characterized by the side-to-side, front and profile shots of the face, are commonly known as "mug shots" and are familiar to anyone who has ever observed "wanted" posters in the post office. The inference of criminal activity raised by these photographs is inescapable. A jury, although never expressly informed of a defendant's past criminal record, will infer a criminal record when the prosecutor produces mug shots of the defendant. Many state and federal courts, disturbed by this practice, have prohibited or placed restrictions on the use of mug shots at trial.[69] The Kentucky Court of Appeals recently considered

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moral character is admissible to disprove any criminal charge. LAWSON, *supra* note 1, at 14-15.

[67] LAWSON, *supra* note 1, at 18. An exception to this rule exists when such evidence of prior criminal activity is being offered for the purpose of proving motive, intent, knowledge, identity, plan or scheme, or absence of mistake. Even when such a purpose exists, however, the trial judge has the discretionary power to exclude the evidence if he determines that its prejudicial effect is greater than its probative value. *Id.* at 19.

[68] See note 67 *supra* for the exceptions to this rule.

[69] United States v. Fosher, 568 F.2d 207 (1st Cir. 1978), *aff'd after remand*, 590 F.2d 381 (1st Cir. 1979); United States v. Silvers, 374 F.2d 828 (7th Cir.), *cert. denied*, 389 U.S. 888 (1967); State v. Cumbo, 451 P.2d 333 (Ariz. Ct. App. 1969); People v.

this problem in *Redd v. Commonwealth.*[70]

Redd had been found guilty and sentenced by the Christian Circuit Court to a prison term of fifteen years for the robbery of a Hopkinsville, Kentucky, Minit-Mart store. On appeal, Redd objected to in-court and out-of-court identification procedures. His first objection concerned the pre-trial identification, in which the victims of the robbery were asked to pick the robber out of a group of police photographs and were allowed to view the defendant in a police station "hold-over" area. Recognizing the potential of these methods to "induce a fancied recognition,"[71] the court of appeals nevertheless refused to find reversible error in Redd's case. The court found that *pre-trial* identification procedures involving the use of mug shots and the viewing of the defendant in a "hold-over" area are often unavoidable. As long as the identification procedures are conducted in a manner that is not unduly suggestive, there is no objection to their use.[72]

The court, however, was unable to dismiss Redd's second allegation of error. At trial, the police detective who had investigated the robbery testified that the identification photographs that the victim had used to identify Redd were "mug shots taken from past incidents."[73] These photographs were introduced into evidence. The detective then testified that the photo display was taken from another armed robbery that he had been assigned to previously. The Kentucky Court of Appeals reacted strongly, stating that the introduction into evidence of these mug shots and the testimony relating to them at trial were "unnecessary, inexcusable, unfair, and reversible."[74]

While the court condemned the use of mug shots in *Redd,* it did not impose a blanket prohibition against the use of police photographs at trial. Rather, the court said a balancing process should occur in making a decision on the admissibility

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Williams, 218 N.E.2d 771 (Ill. App. Ct. 1966); Blue v. State, 235 N.E.2d 471 (Ind. 1968).

[70] 591 S.W.2d 704 (Ky. Ct. App. 1979).

[71] *Id.* at 706.

[72] *Id.*

[73] *Id.*

[74] *Id.* at 707.

of the photographs. This conclusion was reached four years earlier by the Seventh Circuit in *United States ex rel. Bleimehl v. Cannon,*[75] cited with approval in *Redd. Bleimehl* was a habeas corpus proceeding in which the petitioner challenged the admission into evidence of an entire "mug book." The Seventh Circuit determined that the admission of the mug book was prejudicial to the defendant. This finding, however, did not dispose of the matter. The Seventh Circuit noted that in a habeas corpus proceeding, its task was not merely to review the trial court's evidentiary ruling but was also to decide the broader question of whether the petitioner's due process right to a fair trial had been violated. Only if the prejudice to the defendant could be said substantially to outweigh the probative value of the evidence to the jury would the court determine that the petitioner had not received a fair trial. In *Bleimehl,* the Seventh Circuit determined that the prejudice to the defendant was secondary to the mug book's probative value[76] and thus reversed the district court's grant of Bleimehl's habeas corpus petition. Adopting this same test, the Kentucky Court of Appeals found that Redd's mug shot added little probative value, but provided substantial and unnecessary prejudice.[77] It therefore appears that the admissibility of mug shots in a given case is to be determined by balancing the need for the evidence against the potential prejudice to the defendant.

Although adoption of this balancing test disposed of the question of admissibility of mug shots at trial, the Kentucky court was concerned over the manner in which such photographs would be presented to the jury. In *United States v. Harrington,*[78] the Second Circuit Court of Appeals recognized

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[75] 525 F.2d 414 (7th Cir. 1975).

[76] The court determined that the probative value of the mug book was "critical," since the petitioner's defense was focused entirely upon disproving the victim's ability to identify his assailant. The ability of the victim to pick the defendant's picture out of the mug book, in the court's opinion, disposed of the identification issue.

[77] 591 S.W.2d at 708. The Kentucky court observed that *Redd,* unlike *Bleimehl,* was a direct appeal and thus decided the case as a matter of state evidence law. The court noted that it was likely that Redd's conviction would be reversed in a habeas corpus proceeding, on grounds that Redd had not received a fair trial.

[78] 490 F.2d 487 (2d Cir. 1973).

that mug shots, which are inherently indicative of past criminal behavior, can be at least partially disguised so that attention is not immediately drawn to the source of the photographs. The *Harrington* court went on to suggest a course of preparation for the use of mug shots at trial which the Kentucky court cited approvingly:

> [T]he preferable course of action when mug-shots are to be introduced would be to produce photographic duplicates of the mug-shots. These copies would lack any incriminating indicia—i.e., inscriptions or identification numbers, and they would also avoid use of the juxtaposed full face and profile photographic display.[79]

The Kentucky Court of Appeals in *Redd* thus set forth clear and well-developed guidelines for the use of mug shots at trial. The initial determination of the admissibility of the mug shots will be made by balancing the potential prejudice to the defendant against the probative value of the evidence. If it is determined that the probative value is such that the photographs should be admitted, all incriminating indicia must, if possible, be removed.

III. PRIVILEGED COMMUNICATIONS

Kentucky Revised Statute (KRS) section 421.210(4) provides that "[n]o attorney shall testify concerning a communication made to him, in his professional character, by his client, or his advice thereon, without the client's consent." By thus protecting private communications between an attorney and his client, it is felt that the client will more willingly discuss with his attorney all aspects of his case, favorable and unfavorable. Although the statute speaks expressly to communications made by a client to his *attorney*, the question has frequently arisen whether the privilege also extends to statements made to third parties that later are transmitted to an attorney.[80] This question often is encountered in the context

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[79] 591 S.W.2d at 708 (quoting *U.S. v. Harrington*, 490 F.2d at 495).

[80] Generally, if the communication was made to a third person for the express purpose of being transmitted to an attorney, the privilege will be sustained. Where the communication is made in the ordinary course of business, however, with no view

of statements made by an insured to his insurance agent concerning an event that later becomes the basis of a claim covered by the insurance policy. It was this situation that the Kentucky Supreme Court considered in its 1979 decision of *Asbury v. Beerbower*.[81]

In *Beerbower*, the defendant, Mrs. Beerbower, sought a writ of prohibition to prevent discovery of a statement that she had made to her liability insurance carrier following an automobile accident. This statement had been made before the filing of the lawsuit and before counsel had been retained for her. Noting that Mrs. Beerbower's policy required her to cooperate with the insurance company and that the company was obligated to provide counsel for her, the Kentucky Supreme Court concluded that Mrs. Beerbower should not be penalized for confiding in her insurance agent, saying that she probably confided in the insurer's representative in the belief that he would transmit the statement to an attorney on her behalf.[82] Her statement was thus protected from discovery by the plaintiff on the grounds that it fell within the scope of the attorney-client privilege.[83]

The Kentucky Court did not elaborate on the rationale for its decision in *Beerbower*.[84] Other courts that have considered the question of whether statements made to an insurance carrier are immune from discovery have reached the same conclusion as *Beerbower*[85] but have provided more detailed

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to future litigation, the privilege has generally been denied. 48 MICH. L. REV. 364 (1950).

[81] 589 S.W.2d 216 (Ky. 1979).

[82] *Id.* at 217.

[83] A privilege, though generally associated with the right of a witness to testify at trial, applies as well to pre-trial discovery, since a party called to make discovery is a witness. 48 MICH. L. REV. 364 (1950).

[84] The Court appears to have adopted the rationale of People v. Ryan, 197 N.E.2d 15, 17 (Ill. 1964), a portion of which the Court quoted:

> The insured is ordinarily not represented by counsel of his own choosing either at the time of making the communication or during the course of litigation. Under such circumstances we believe that the insured may properly assume that the communication is made to the insurer as an agent for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured.

589 S.W.2d at 217.

[85] *E.g.*, Heffron v. Los Angeles Transit Lines, 339 P.2d 567, 573 (Cal. Dist. Ct.

and persuasive explanations for their decisions. In *Brakhage v. Graff*,[86] for example, the Supreme Court of Nebraska justified its result on the basis that the attorney-client privilege extends to statements made to *agents* of an attorney.[87] Since the statement made by the insured in *Brakhage* was intended for the use of the attorneys selected by the insurer to represent the insured, the field claims representative was regarded as the attorney's agent in this matter. Similarly, in *Hollien v. Kaye*,[88] statements by the defendants to their automobile liability carrier were not subject to discovery because the communications were ultimately intended for the insured's attorney. As the New York court pointed out: "The delivery of the statements by these defendants to the carrier's representative, whether he be a layman or lawyer, constitutes the carrier and such representative the agent of the defendants, to transmit such statements to their attorney, when he has been selected and retained by the carrier."[89]

Other cases, however, condemn the expansion of the privilege beyond the confines of the attorney's office.[90] These latter cases deny the extension of the privilege to statements made to insurance carriers, particularly where the statements were made before litigation was anticipated and before counsel had been retained,[91] in the belief that such statements are in the nature of reports made in the ordinary course of duty and lack the aspect of confidentiality that the privilege seeks to protect.[92]

Interestingly, few courts that have denied the attorney-client privilege to statements made to insurance carriers have

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App. 1959); Vann v. Florida, 85 So. 2d 133, 138 (Fla. 1956); Travelers Indem. Co. v. Cochrane, 98 N.E.2d 840, 846 (Ohio 1951).

[86] 206 N.W.2d 45 (Neb. 1973).

[87] *Id.* at 48.

[88] 87 N.Y.S.2d 782 (Sup. Ct. 1949).

[89] *Id.* at 785.

[90] Gottlieb v. Bresler, 24 F.R.D. 371, 372 (D.D.C. 1959); Matthies v. Peter F. Connolly Co., 2 F.R.D. 277 (E.D.N.Y. 1941); Jacobi v. Podevels, 127 N.W.2d 73, 76 (Wis. 1964).

[91] Jacobi v. Podevels, 127 N.W.2d 73, 75 (Wis. 1964).

[92] Proponents of this view overlook the fact that an insured's report to her liability insurance carrier has no value outside its use in future litigation. MCCORMICK, *supra* note 10, at 201-02.

considered the work product rule as an alternative theory on which to prevent discovery.[93] Because the work product rule specifically exempts from discovery, under most circumstances, material prepared in anticipation of litigation by a party *or a representative of the party,* the rule is well-tailored to those cases in which the statement that is sought was prepared by a party's insurance representative.[94] Unlike the attorney-client privilege, however, the work product rule provides only a qualified immunity in that if the opposing party can demonstrate undue hardship, the court may order production of the document.[95] Further, the work product rule is only available where the material sought is prepared in anticipation of litigation.[96] The attorney-client privilege, on the other hand, applies to all confidential communications on legal matters. It is likely that the Kentucky Supreme Court did not consider basing its decision on the work product theory because of these limitations. By applying the attorney-client privilege, the Supreme Court in *Beerbower* provided absolute protection from disclosure by liability insurers of statements made by their clients following an accident.

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[93] The work product rule is actually a rule of discovery. Kentucky's rule is found in KY. R. CIV. P. 26.02(3)(a) and states in pertinent part:

> [A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party *or by or for that other party's representative (including his . . . insurer . . .)* only upon showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

(emphasis added)

[94] This rule has been applied to insurance agents' trial preparation materials in the following cases: Bunting v. Gainsville Mach. Co., 53 F.R.D. 594, 595 (D. Del. 1971); Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249, 251 (D.D.C. 1970), *aff'd,* 479 F.2d 920 (D.C. Cir. 1973); Fey v. Stauffer Chem. Co., 19 F.R.D. 526, 528 (D. Neb. 1956).

[95] See note 93 *supra* for text of the rule in Kentucky.

[96] Nazareth Literary & Benevolent Inst. v. Stephenson, 503 S.W.2d 177, 178 (Ky. 1973).